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JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 1370

GOLAY & CO., INC.,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD

and

INTERNATIONAL UNION OF UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, UAW-AFL-CIO,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit.

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Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit.

Golay & Co., Inc. (hereinafter referred to as the "Company"), prays that a writ of certiorari issue to review the judgment and decree of the United States Court of Appeals for the Seventh Circuit (hereinafter referred to as the "Seventh Circuit") enforcing an order of the National Labor Relations Board (hereinafter referred to as the "Board") against Golay & Co., Inc.

CITATIONS TO OPINIONS BELOW.

The opinion of the Seventh Circuit (printed in Appendix A hereto, *infra* pp. 1a to 7a) is reported at 371 F.2d 259. The Seventh Circuit's decree (printed in Appendix D hereto, *infra* pp. 11a to 18a) and orders (printed in Appendix C hereto, pp. 9a to 10a) denying the Company's petition for rehearing and rehearing en banc are unreported. The decision and order of the Board (C.A. 7-33)[1] are reported at 156 N.L.R.B. No. 123.

JURISDICTION.

The opinion of the Seventh Circuit was handed down December 1, 1966; the Company's timely petition for rehearing and rehearing en banc was denied February 6, 1967; and on February 8, 1967, the Seventh Circuit entered its decree against the Company. The jurisdiction of this Court is invoked under 62 Stat. 928 (1948), 28 U.S.C. Section 1254(1) (1964), and under 61 Stat. 147 (1947) as amended 29 U.S.C. Section 160(f) (1964).

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[1] References to the appendix to the Company's brief to the Seventh Circuit are designated "C.A.".

QUESTIONS PRESENTED.

1. Was there substantial evidence in the record as a whole to justify the Seventh Circuit's affirmation of the Board's findings of fact?

2. May the Board order the reinstatement of employees discharged for cause by balancing alleged employer unfair practices against employee misconduct?

FEDERAL STATUTES INVOLVED.

The primary statutory provisions involved are Sections 8(a)(3) and 10(c) of the Labor Management Relations Act (Taft-Hartley Act) (hereinafter referred to as the "Act"). 61 Stat. 140 (1947), as amended, 29 U.S.C. Section 158(a)(3) (1964); 61 Stat. 147 (1947), 29 U.S.C. Section 160(c) (1964). All pertinent parts of the Act appear in Appendix E hereto, p. 19a.

STATEMENT OF THE CASE.

Basis of Federal Jurisdiction. The jurisdiction of the Seventh Circuit was invoked pursuant to 29 U.S.C. Section 10(f) to review an order of the Board issued pursuant to the Act.

Summary of Facts. During September and October, 1962, four employees were terminated by the Company, and the Trial Examiner found that two of the terminations of employment—those of Walter Heaston and Melvin Moistner—did not violate Section 8(a)(3) of the Act. (C.A. 62-63; 68-69.) He found that Heaston was laid off for economic reasons and that there was insufficient evidence to establish discrimination in Moistner's layoff. The Board overturned the Trial Examiner's findings with respect to Moistner and Heaston, and the Seventh Circuit affirmed the Board. (C.A. 14-15; 18.) The Company also was found to have committed a few inadvertent, highly technical violations of Section 8(a)(1) and one inadvertent, highly technical violation of Section 8(a)(2) during the period prior to November 19, 1962. (C.A. 8; 165.)

On November 19, 1962, a group of the Company's employees returned to their work stations following their noon break and refused to work and refused to leave the plant. The evidence showed and the Trial Examiner found that their only reason for striking was the discharge of a single employee earlier that day. (C.A. 73; 75.) The evidence showed and the Trial Examiner found that 15 of the strikers remained in the plant 4 or more hours

after they quit working;[2] two others were there 3 hours after they quit working;[3] and 10 or more were there from 1 to 2 hours after they quit working.[4]

During this time the strikers shut off machinery (C.A. 144; 154; 200; 218-219; 239.), told non-strikers to leave the plant, (C.A. 117; 144.), refused to work, refused to leave the plant, refused to answer questions (C.A. 75; 235.), and prevented the night shift from coming on as scheduled. (C.A. 230; 246; 257.) Production was brought to a complete halt and remained halted most of the afternoon. (C.A. 184-185; 226-227.) In short, the record shows that the strikers seized the plant for the better part of a day. Those discharged were discharged for engaging in unprotected, unlawful concerted activity and for refusing to leave the plant when requested. (C.A. 19.)

On these facts the Board found, contrary to the Trial Examiner, and the Seventh Circuit affirmed its findings, that the strike was caused by all the Company's alleged unfair practices (C.A. 22-23.), that the strikers loitered in the plant only 1½ to 2 hours (C.A. 23.), that there was no threat of violence (C.A. 23-24.) nor were there acts of defiance by the strikers (C.A. 20.), that operations were somewhat curtailed but not completely shut down (C.A. 24.), and that the strikers were discharged for refusing to work or for standing mute when polled. (C.A. 19.)

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[2] C.A. 100; 106-107; 108-109; 117-118; 119-120; 120; 121; 122-123; 123-124; 128-129; 129-130; 140-141; 150-151; 152-153; 156.

[3] C.A. 79-80; 147-148.

[4] C.A. 82; 84-85; 86; 91; 92-93; 95; 98; 131-132; 149-150; 154-155.

The day following the in-plant strike, November 20, 1962, non-striking employees, who had been instructed by the Company to report for work at 6 a.m. and 7 a.m. (C.A. 231.), were confronted at the entry to the plant parking lot with pickets less than 3 feet apart. (C.A. 159; 139; 137; 106; 209; 220; 253-254; 254-255; 260-264; 264.) Cars were prevented from entering and some employees went home as a result. (C.A. 159; 193; 255-256.) Again contrary to the Trial Examiner, the Board and the Seventh Circuit found that "there was no evidence that any employee desiring to enter was prevented from doing so."

The Board found that the conduct of the strikers was within the protection of the Act; but the Seventh Circuit refused to adopt this finding. Even so, both the Board and the Seventh Circuit applied the so-called *Thayer* doctrine, *NLRB* v. *Thayer Co.*, 213 F.2d 748 (1st Cir. 1954), *cert. denied,* 348 U.S. 883, and balanced the employees' misconduct against the Company's alleged insignificant, inadvertent and highly technical unfair practices to determine whether reinstatement would effectuate the policies of the Act. On the basis of balancing, reinstatement of the discharged strikers was ordered in spite of their misconduct.

REASONS FOR GRANTING THE WRIT.

Question 1

In reviewing decisions of the Board, Courts of Appeal have a duty to determine whether on the record as a whole there is "substantial evidence to support agency findings." *Universal Camera Corp.* v. *NLRB,* 340 U.S. 474 (1951). This duty was imposed deliberately and with good reason.

> "We conclude, therefore, the Administrative Procedure Act and the Taft-Hartley Act direct that courts must now assume more responsibility for the reasonableness and fairness of Labor Board decisions than some courts have shown in the past. Reviewing courts must be influenced by a feeling that they are not to abdicate the conventional judicial function. Congress has imposed on them responsibility for assuring that the Board keeps within reasonable grounds." 340 U.S. at 490.

At the same time, the Supreme Court has stated that it will intervene in cases in which the circuit courts of appeal abdicate this duty. *Universal Camera Corp.,* 340 U.S. at 491.

Yet, the record in the present case shows that many of the Board's findings and inferences are not merely unsupported by the evidence; they are in conflict with it. In addition, the Board's reversal, without support in the record, of the Trial Examiner on many important findings was affirmed, even though the Seventh Circuit has required that such reversals be supported in the record. *Indiana Rayon Corp.* v. *NLRB,* 355 F.2d 535, 540 (7th

Cir. 1966). The Board, with the acquiescence of the Seventh Circuit, has rewritten the facts to support a decision that cannot be supported on the record.

Question 2

In its opinion, the Seventh Circuit endorsed the so-called *Thayer* doctrine under which the Board may balance employee misconduct against employer unfair practices in ordering reinstatement regardless of whether a discharge was for cause. *NLRB* v. *Thayer Co.*, 213 F.2d 748, 753 (1st Cir. 1954), *cert. denied* 348 U.S. 883. The *Thayer* doctrine is a reversion to the law of the jungle in which the union, if it believes that the employer's conduct is "flagrant" or constitutes "massive" unfair labor practices may advise its members that they may engage in misconduct with impunity. This doctrine is a positive inducement to lawlessness in labor disputes. The Seventh Circuit has held that because Golay was guilty of unfair labor practices, its employees could thereafter engage in misconduct (which the Seventh Circuit holds to be *un*protected activity) and that Golay could do absolutely nothing to protect itself against the misconduct of employees.

The United States Supreme Court has never been asked to grant certiorari in a case of this kind. The *Thayer* doctrine has been applied in only two cases. In *Thayer* and in *UAW Local 833* v. *NLRB*, 300 F.2d 699 (D.C. Cir. 1962), *cert. denied* 370 U.S. 911, certiorari was sought and denied; but both of those decisions merely remanded the cases to the Board for application of balancing, so the *Thayer* doctrine was not ripe for consideration by the Supreme Court in either case. Certiorari also was sought for the court decision enforcing the order based on bal-

ancing entered by the Board on remand after the *Local 833* decision. *Kohler Co.* v. *NLRB,* 345 F.2d 748 (D.C. Cir. 1965), *cert. denied* 382 U.S. 836. However, the gist of the main arguments of both the Board and the UAW in opposition to Kohler Co.'s petition for certiorari was that the company's unique unfair practices required a unique remedy. Great emphasis was placed on the company's "unremitting calculated provocations," UAW Brief p. 15, *Kohler Co.* v. *NLRB,* 382 U.S. 836; *Kohler Co.,* 148 N.L.R.B. 1434, 1446 (1965), and twenty year record of open hostility to unions.

Even if balancing of misconduct is proper in a case such as the *Kohler* case (and the Company does not admit that it is), the present case in no way resembles *Kohler.* The Company's unfair practices—if they were such—were three separate discharges (two of which the Trial Examiner found lawful) occurring over a period of months and insignificant, inadvertent, and highly technical violations of Sections 8(a)(1) and 8(a)(2) of the Act. The 8(a)(1) violations were, for the most part, based on incidents of a sort that are inevitable in any large operation undergoing an organizational campaign. There is nothing in the record to suggest that two of the discharges or any of the 8(a)(1) violations or the 8(a)(2) violations had or could have had a provocative effect on the employees. To say that the Company's unfair practices justify application of the *Thayer* doctrine is to make a drastic and unsound doctrine virtually limitless in its application, both actual and potential.

Regardless of the specific facts involved, the so-called doctrine presents an important question of federal law which has not been, but should be settled by the United

States Supreme Court. Consideration of the doctrine is imperative because it is in direct and irreconcilable conflict with the Act itself. Section 10(c) of the Act provides:

> "No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged or the payment to him of any back pay, if such individual was suspended or discharged for cause." 29 U.S.C. §160(c) (1964).

Legislative history makes it crystal clear that Congress intended that interference with production of the sort engaged in by the strikers in the present case be considered "cause" within the meaning of Section 10(c):

> "C. A third change forbids the Board to reinstate an individual unless the weight of the evidence shows that the individual was not suspended or discharged for cause. * * * Matter of *Wyman-Gordon Company,* 62 N.L.R.B. 561 (1945), is typical of the Board's attitude in such cases. In that case, the employer discharged an active union member for interrupting other employees at their work on materials for war. The Board reinstated the man with back pay. The Company appealed. In court, the Board argued that the employee's conduct did not 'seriously interfere with output for war, or cause undue spoiling of materials', and that the employee was not 'enormously delinquent.' Declaring that *any* interference, slight or moderate justified discharge, the court said (17 L.L.R. 823) [153 F.2d 480 (7th Cir. 1946)]:
>
> > 'If it were not before us in print, we would find it difficult to believe that any responsible person or agency would resort to such asinine reasoning.'
>
> *The change made in Section 10(e) [sic] on this subject is intended to put an end to the belief, now widely held and certainly justified by the Board's decisions, that engaging in union activities carries with it a license to loaf, wander about the plants,*

> *refuse to work, waste time, break rules, and engage in incivilities and other disorders and misconduct.* * * * The Board may not 'infer' an improper motive when the evidence shows cause for discipline or discharge." H.R. Rep. No. 245, 80th Cong. 1st Sess. 42-3 (1947) (emphasis added.).

Yet, according to the so-called *Thayer* doctrine, the Board can order reinstatement of employees discharged for cause if it finds that the employer's unfair practices outweigh the misconduct of the discharged employees. The "reasoning" behind the doctrine seems to be that "cause" itself is determined by balancing; or in other words, cause for discharging an employee depends on what the employer, not the employee, does. Such semantic gymnastics are indeed bizarre, and it is not surprising that the "reasoning" is without any support whatever in the legislative history of Section 10(c).

In short, the courts which created and applied the *Thayer* doctrine, right or wrong, rewrote Section 10(c) to have a meaning contradictory both to its express language and to the stated intent of Congress. Understandably, the courts and tribunals which have attempted to apply the doctrine have been in frequent and material disagreement as to exactly what the law surrounding Section 10(c) and the Thayer doctrine is.[5] A situation in

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[5] It seems significant that both the Board and the courts which have attempted to follow *Thayer* have disagreed as to the meaning and application of it. See *Kohler Co.* v. *NLRB*, 345 F.2d at 749 (dissent by Miller, J.); *UAW Local 833* v. *NLRB*, 300 F.2d at 707 (dissenting opinion of Miller, C.J.); *Kohler Co.*, 148 N.L.R.B. at 1457 (dissenting opinion of Member Leedom); *H. N. Thayer Co.*, 115 N.L.R.B. 1591, 1595 (1956).

which the inferior federal courts have, by outright judicial legislation, created such controversy and confusion seems to cry out for Supreme Court consideration, if for no other purpose than to clear the air.

The so-called *Thayer* doctrine also conflicts squarely with the opinion of the United States Supreme Court in *NLRB* v. *Fansteel Metallurgical Co.*, 306 U.S. 240 (1939). That case involved the discharge of sitdown strikers, and the Court rejected the same balancing argument made in the present case:

> "To justify such conduct because of the existence of a labor dispute or of an unfair labor practice would be to put a premium on resort to force instead of legal remedies and to subvert the principles of law and order which lie at the foundations of society." 306 U.S. at 253.

Several circuit courts have applied the *Fansteel* rule to strikers who engaged in misconduct short of actual violence even though the employer was found guilty of unfair labor practices which occurred prior to the misconduct. See *e.g.*, *NLRB* v. *Clearfield Cheese Co.*, 213 F.2d 70 (3d Cir. 1954); *NLRB* v. *Longview Furniture Co.*, 206 F.2d 274 (4th Cir. 1953); *W. T. Rawleigh Co.* v. *NLRB*, 190 F.2d 832 (7th Cir. 1951).

The application of the so-called *Thayer* doctrine in the present case also is squarely in conflict with the opinion of the United States Court of Appeals for the Second Circuit in *NLRB* v. *Ford Radio & Mica Corp.*, 258 F.2d 457 (2d Cir. 1958). In that case, employees struck shortly after the discharge of a supervisor, and the employer, which thought the strike was to compel reinstatement of the supervisor, discharged the employees for engaging in

unprotected activity. The Board held the strike was for other, lawful purposes and ordered reinstatement. The Court found the activity to be unprotected and denied reinstatement. It held (citing *Thayer*):

> "If it was not a protected activity, then it is axiomatic that the employer, regardless of its motivation, may discharge the strikers and the Board is powerless to order reinstatement." 258 F.2d at 464.

In the present case the Seventh Circuit refused to adopt the Board's finding that the strikers' activity was protected (p. 4a), yet it ordered reinstatement of the strikers who were discharged for participation in the unprotected activity. The conflict with *Ford Radio* seems irreconcilable. See also *NLRB* v. *Blades Mfg. Corp.*, 344 F.2d 998 (8th Cir. 1965), where the court refused to enforce a Board reinstatement order based on *Thayer*.

Finally, there has been general comment pointedly critical both of the so-called *Thayer* doctrine, Stewart, *Conversion of Strikes: Economic to Unfair Labor Practice*, 45 Va. L. Rev. 1322, 1324-25 (1959), and of the *Thayer* doctrine as applied in the *Kohler* case. Stewart & Townsend, *Strike Violence: The Need for Federal Injunctions*, 114 V. Pa. L. Rev. 459, 474-76 (1966).

SUMMARY.

If the court's decision in this case is permitted to stand, the Seventh Circuit will have been permitted to abdicate a duty assigned it by the United States Supreme Court; a new and violence-charged weapon, heretofore unlawful in each and every sense of the word, will have been added to the ever-growing union arsenal; the courts and the Board will have been permitted to rewrite a clear and unambiguous statute in a way that conflicts with specific Congressional purpose as well as the express policy of the Act; and an exception will have been written into the premise implied by the Court in *Adderly* v. *Florida*, 385 U.S. 39 (1966):

> "The State, *no less than a private owner of property*, has power to preserve the property under its control for the use to which it is unlawfully dedicated." 385 U.S. at 47. (Emphasis added.)

CONCLUSION.

For the reasons stated, this petition for certiorari should be granted.

Respectfully submitted,

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Counsel for Petitioner.

APPENDIX A

In the United States Court of Appeals For the Seventh Circuit

Nos. 15540, 15656
SEPTEMBER TERM, 1966 SEPTEMBER SESSION, 1966

GOLAY & CO., INC.,
Petitioner,
No. 15540 v.
NATIONAL LABOR RELATIONS BOARD,
Respondent.
INTERNATIONAL UNION OF UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, UAW-AFL-CIO,
Petitioner,
No. 15656 v.
NATIONAL LABOR RELATIONS BOARD,
Respondent.

} Consolidated Petitions to Review and Cross-Petition to Enforce an Order of the National Labor Relations Board.

December 1, 1966

Before HASTINGS, *Chief Judge,* KILEY and CUMMINGS, *Circuit Judges.*

KILEY, *Circuit Judge.* In Appeal No. 15540, Golay & Company petitions this court to review and set aside an order of the Board finding it guilty of unfair labor practices in violation of sections 8(a)(1) and (3). In Appeal No. 15656 the Union[1] petitions for a modification of the

[1] International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW-AFL-CIO.

Board's order with respect to the date from which back pay was due unlawfully discharged employees. We granted leave to the Union to intervene in No. 15540 and to Golay to intervene in No. 15656, and consolidated the appeals. In each appeal the Board cross-petitions for enforcement. We order enforcement of the order with certain alterations in the decision and order.

No. 15540

Golay's four plants are located in Cambridge City, Indiana. During the period September through November 20, 1962, the Union conducted an organizational drive among Golay's approximately 350 employees. During this drive employees James, Heaston, Moistner, Covalt and Paris were laid off or discharged. Paris was discharged the morning of November 19, and during the lunch hour his fellow employees decided to strike in protest of the discharges. The next morning the strikers picketed the plant. Golay discharged thirty-four of the employees who participated in the strike and later refused to rehire eight other strikers who had not been discharged.

On November 1, 1962, the Union filed three charges, with subsequent amendments, involving alleged unfair labor practices in layoffs, discharges or terminations of employees in three of the plants. Upon these charges the General Counsel issued a consolidated complaint alleging Golay's violation of sections 8(a)(1) and (3). Hearings were conducted from April 8 to April 24, 1963. The Trial Examiner concluded that Golay had violated 8(a)(1) during the organizational period by surveillance of Union activities, by interrogating and threatening employees, by promising or granting benefits, by attempting to form a company union and by interfering with employees' rights to wear union insignia. He also concluded that the discharges of James and Paris were discriminatory in violation of 8(a)(3) and (1) but that the layoffs or discharges of Covalt, Heaston and Moistner were not discriminatory.

The Board adopted the findings and conclusions of the Examiner so far as he found violations by Golay. It disagreed with the Examiner's finding that Golay's discharges of Heaston and Moistner[2] were not 8(a)(3) and (1) violations. Golay argues that the findings and conclusions of interference and coercion in violation of 8(a)(1) and of discriminatory discharges (of James, Paris, Heaston and Moistner) in violation of 8(a)(3) and (1) are not supported by substantial evidence on the record as a whole.

We have read both the order and decision. We adopt the Board's decision against Golay with respect to these contentions as the decision of this court. We see no necessity of repeating here the discussion in the Board's decision of the Intermediate Report and Recommended Order of the Examiner, both of which are reported at 156 N.L.R.B. No. 123 (Feb. 4, 1966). The Board did not reject or set aside any credibility determinations of the Examiner. Under the limited scope of this court's jurisdiction to review Board orders we find substantial evidence in the record as a whole to justify the Board's decision and order. *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474 (1951).

We turn now to the question of the discharges and refusals to rehire the forty-two strikers. The Trial Examiner found that the strike was precipitated by the discharge of Paris and was an unfair labor practice strike. He concluded that Golay violated 8(a)(3) and (1) because nineteeen of the thirty-four post-strike discharges were unlawful, but that of these nineteen employees, only eight were entitled to reinstatement. He found that misconduct by the other eleven, subsequent to their discharge, barred their reinstatement under section 10(c). He concluded that Golay had committed further 8(a)(3) and (1) violations by refusing to rehire the eight strikers who had not been discharged.

[2] The Board and Trial Examiner agreed that Covalt's layoff was not discriminatory.

The conduct upon which the Examiner predicated his conclusions that fifteen of the discharges were lawful and that eleven of those unlawfully discharged were not entitled to reinstatement consisted of "loitering" or wandering around the Golay plant during the afternoon of November 19, punching in at the time clock with no intention of returning to work, failing to respond to Golay's reasonable inquiries as to whether they would or would not work, and misconduct during picketing for one and one-half to two hours on the morning of November 20. He also found that one employee had carried a hammer around with him on the afternoon of the strike.

The Board disagreed with the Trial Examiner and found that all of the discharges on November 19 were in violation of 8(a)(3) and (1). It found that the conduct relied upon by the Examiner as cause for discharge was "not unprotected." It concluded that all forty-two employees were entitled to reinstatement under section 10(c).

Golay contends that the November 19 "sitdown" strike and the "mass picketing" on November 20 were unlawful, unprotected activities, that the discharges of the employees involved in those activities did not violate 8(a)(3) and (1), and that these employees are not entitled to reinstatement under section 10(c).

At least nineteen of the strikers did not participate in the alleged misconduct, at least until after their discharge. Since there is substantial evidence on the record as a whole to support findings of 8(a)(3) and (1) violations for the discharge of these nineteen strikers, we need not and do not decide whether the other discharges constituted similar violations or whether the alleged misconduct was protected. The findings with respect to the nineteen are ample to support the Board's order that Golay refrain from further discriminatory conduct. To the extent that the Board found the alleged misconduct to be protected and concluded that Golay had committed 8(a)(3) and (1) violations by discharging the other employees, we do not adopt its opinion or enforce its order.

The only question remaining is whether the strikers' alleged misconduct on November 19 and 20 bars an order of reinstatement for all forty-two employees under section 10(c).

The Golay employees "loitered" or wandered about for only one and one-half to two hours and committed no acts of violence. The alleged "sitdown" interfered with production no more than a simple cessation of work by these employees would have. In our opinion the November 19 strike did not come within the term "sitdown" strike used by the Supreme Court to describe the strike in *NLRB* v. *Fansteel Metallurgical Corp.*, 306 U.S. 240 (1939), where the employees seized and retained possession of the employer's plant for nine days "without shadow of legal right." *Id.* at 252. Nor did the Golay strike amount to "seizure of control" as in *NLRB* v. *Clinchfield Coal Corp.*, 145 F.2d 66, 72 (4th Cir. 1944), where striking mine workers blocked mine entrances and prevented mining operations for more than a day.

On November 20 the Golay pickets, numbering from fifteen to seventy at various times, walked in a circle at the driveway to the company parking lot. At times they were so close together as to prevent cars from entering the lot, but some employees crossed the picket line on foot after parking outside. The Trial Examiner found that one employee crossing the line had been struck by an object, and that one other employee was threatened several times. The alleged objectionable conduct lasted for no more than two hours, from 5:30 to 7:30 a.m., and there was no evidence that any employee desiring to enter was prevented from doing so. The picketing was not similar to that in *W. R. Rawleigh Co.* v. *NLRB*, 190 F.2d 832 (7th Cir. 1951), cited to the argument, where this court vacated a Board order of reinstatement. In *Rawleigh*, delivery and shipment of property was impeded, and nonstriking employees were unable to enter the plant for more than a month because of the "breast to back" picketing technique and were repelled by physical force if they attempted to enter. *Id.* at 840.

Whether or not the November 19 and 20 conduct was protected under section 7, we think the Board was justified in ordering reinstatement of the employees involved. Section 10(c) provides that the Board has power to order reinstatement as a remedy for employer unfair labor practices if the order will effectuate the policies of the Taft-Hartley Act and if the employees to be reinstated were not discharged "for cause." As the court said in *NLRB* v. *Thayer Co.*, 213 F.2d 748, 753 n.6 (1st Cir.), *cert. denied*, 348 U.S. 883 (1954):

> [A] determination that an employee is not engaged in a § 7 activity does not necessarily mean that, if he is discharged for his participation in the unprotected action, the discharge is "for cause." That depends on the surrounding circumstances. What is *cause* in one situation may not be in another. (Italics in original.)

The November 19 strike was triggered by the discharge of employee Paris after other discriminatory discharges and coercive conduct. The strike and the picketing were caused by Golay's "massive" unfair labor practices. Balancing the strikers' conduct against Golay's, *NLRB* v. *Thayer Co.*, 213 F.2d at 753, we agree with the Board that the "misconduct was not of such a serious nature in the total circumstances of this case as to warrant denial of their reinstatement."

No. 15656

The Board ordered reinstatement of the forty-two employees discharged or refused reinstatement because of the strike and picketing and ordered Golay to make them whole for loss of wages commencing March 25, 1963, when it received a letter signed by the employees seeking reinstatement.[3] The Union contends that the loss of wages

[3] The Board found that five of the forty-two had made earlier unconditional offers to return and that five others did likewise on dates not fixed by the record. The Board ordered computation of back pay for them from those dates, leaving for compliance the determination of the dates with respect to the latter five.

should be measured from November 19, 1962, when it insists the employees were entitled to be reinstated.

The Union's contention rests in part upon the statement made by a Union representative to a Golay official on the afternoon of the strike that "you are able to settle this in a very few minutes . . . and return the people to their jobs." We see no merit in this contention. We think the Board properly found that this statement was not an unconditional offer by the employees to return to work. The obligation to reinstate arose upon receipt of the unequivocal request signed by the employees, which was the first authoritative, unequivocal request made to Golay.

The Union also claims that unlawfully discharged employees are not required to ask for reinstatement and that participation in an unfair labor practice strike does not necessarily defeat the right to back pay. We agree. But in fashioning remedies for unfair labor practices, the Board has discretion under section 10(c) to order reinstatement with or without back pay "as will effectuate the policies" of the Act under the circumstances of a particular case. *Phelps Dodge Corp.* v. *NLRB,* 313 U.S. 177, 198-99 (1941); *Bon Hennings Logging Co.* v. *NLRB,* 308 F.2d 548, 555-58 (9th Cir. 1962). We see no abuse of discretion in the Board's choice of dates with respect to back pay.

The Board's order will be enforced, as modified.

A true Copy:

Teste:

.....

Clerk of the United States Court of Appeals for the Seventh Circuit.

APPENDIX B

In the

United States Court of Appeals

For the Seventh Circuit

Thursday, December 1, 1966
Before
Hon. JOHN S. HASTINGS, *Chief Judge*
Hon. ROGER J. KILEY, *Circuit Judge*
Hon. WALTER J. CUMMINGS, JR., *Circuit Judge*

GOLAY & CO., INC., *Petitioner,*

No. 15540 vs.

NATIONAL LABOR RELATIONS BOARD, *Respondent.*

INTERNATIONAL UNION OF UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, UAW-AFL-CIO, *Petitioner,*

No. 15656 vs.

NATIONAL LABOR RELATIONS BOARD, *Respondent.*

Petitions to review and cross-petition to enforce an order of the National Labor Relations Board.

This cause came on to be heard on the petitions to review and cross-petition to enforce an order of the National Labor Relations Board, and the record from the National Labor Relations Board, and was argued by counsel.

On consideration whereof, it is ordered by this Court that the order entered in this cause by the National Labor

Relations Board on February 4, 1966, be modified in accordance with the opinion of this Court filed this day, and as so modified, the order will be enforced. Upon presentation, an appropriate decree will be entered.

APPENDIX C

In the United States Court of Appeals
For the Seventh Circuit

Monday, February 6, 1967

Before

Hon. JOHN S. HASTINGS, *Chief Judge*
Hon. ROGER J. KILEY, *Circuit Judge*
Hon. WALTER J. CUMMINGS, JR., *Circuit Judge*

GOLAY & CO., INC., *Petitioner,*

No. 15540 vs.

NATIONAL LABOR RELATIONS BOARD, *Respondent.*

Petition for review of an order of the National Labor Relations Board.

It Is Ordered that the petition for a rehearing of this cause be, and the same is hereby, DENIED.

In the

United States Court of Appeals

For the Seventh Circuit

Monday, February 6, 1967

Before

Hon. JOHN S. HASTINGS, *Chief Judge*
Hon. ELMER J. SCHNACKENBERG, *Circuit Judge*
Hon. WIN G. KNOCH, *Circuit Judge*
Hon. LATHAM CASTLE, *Circuit Judge*
Hon. ROGER J. KILEY, *Circuit Judge*
Hon. LUTHER M. SWYGERT, *Circuit Judge*
Hon. THOMAS E. FAIRCHILD, *Circuit Judge*
Hon. WALTER J. CUMMINGS, JR., *Circuit Judge*

GOLAY & CO., INC.,
Petitioner,
No. 15540 vs.
NATIONAL LABOR RELATIONS BOARD,
Respondent.

Petition for review of an order of the National Labor Relations Board.

It Is Ordered by the Court that the petition for rehearing *en banc* of the above entitled cause be, and the same is hereby DENIED.

APPENDIX D

In the United States Court of Appeals For the Seventh Circuit

GOLAY & CO., INC.,
Petitioner,
vs.
NATIONAL LABOR RELATIONS BOARD,
Respondent.
No. 15540

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, UAW, AFL-CIO,
Petitioner,
vs.
NATIONAL LABOR RELATIONS BOARD,
Respondent.
No. 15656

DECREE
(Filed February 8, 1967)

Before: HASTINGS, *Chief Judge,* KILEY and CUMMINGS, *Circuit Judges.*

The above consolidated causes came on to be heard upon petitions to review and a cross-petition to enforce an Order of the National Labor Relations Board, dated Febru-

ary 4, 1966, and corrected February 14, 1966, directed against Golay & Co., Inc., its officers, agents, successors, and assigns. The Court heard argument of respective counsel on September 28, 1966, and has considered the briefs and transcript of record filed in these causes. On December 1, 1966, the Court, being fully advised in the premises, handed down its opinion granting enforcement of the Board's Order. In conformity therewith, it is hereby

Ordered, Adjudged And Decreed by the United States Court of Appeals for the Seventh Circuit that Golay & Co., Inc., its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Discouraging membership in International Union, United Automobile, Aerospace, and Agricultural Implement Workers of America, UAW AFL-CIO, hereinafter called UAW, or in any other labor organization, by discharging employees, or in any other manner discriminating against them in regard to their hire or tenure of employment or any other term or condition of employment.

(b) Discharging employees for engaging in lawful strikes, picketing, and other lawful protected and concerted activities, or for respecting and honoring lawful picket lines.

(c) Refusing to employ or recall employees for engaging in lawful protected and concerted activities.

(d) Interrogating its employees concerning their own and other employees' membership in, activities on behalf of, and sympathies for the UAW, or any other labor organization, in a manner constituting interference, restraint, or coercion.

(e) Engaging in surveillance and also asking its employees to engage in surveillance of the UAW, or any other labor organization, and to report on the union activities and sentiments of their fellow employees.

(f) Threatening its employees with discharge, layoff, loss of overtime, closing, selling, moving, or ter-

minating its operations if they joined, designated or assisted the UAW, or any other labor organization.

(g) Granting or promising its employees economic benefits if they refrained from becoming or remaining members of the UAW, or any other labor organization, or if they refrained from giving such labor organization assistance and support.

(h) Attempting to form a labor organization among its employees.

(i) Interfering with the right of employees to wear union insignia.

(j) In any other manner interfering with, restraining, or coercing employees in the right to self-organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any or all of such activities.

2. Take the following affirmative action the Board has found necessary to effectuate the policies of the Act:

(a) Offer the employees named below in this paragraph immediate and full reinstatement to their former or substantially equivalent positions, without prejudice to their seniority or other rights and privileges previously enjoyed, and make each of them whole for any loss of pay, plus interest at the rate of 6 percentum per annum, which they may have suffered by reason of the discrimination against them:

Baker, Marion K.
Blair, Earl R.
Caudill, James
Cecil, Henry Jr.,
Chaney, Walter H.
Clemons, William
Cornet, Harold
Dillman, George
Jones, Walter L.
Keal, Ronald L.
Lawrence, Robert
Meyer, Robert
Mills, Willie Joe
Nash, Charles
Nick, Robert Lee
O'Dear, Billy

Durham, Howard
Eldridge, George
Ford, Earl
Fowler, Bivon
Fowler, Kenneth
Fox, John H.
Frady, Marvin
Goble, Gerald
Hall, Benny
Harrison, Thomas J.
Herbert, Edward
Isaacs, Robert
James, Jesse
Jamison, John
Paris, Paul
Pebworth, Lester
Powell, James
Purvis, Donnie Ray
Raby, James
Raby, John
Sams, Paul
Steele, James
Toney, Richard
Transier, Andrew
Tyree, Billy
Vickers, Delbert
Winchester, James
Wyramon, Carl

(b) To the extent they have not already done so, offer to reinstate Walter Heaston and Melvin Moistner, to their former or substantially equivalent positions without prejudice to their respective seniority or other rights and privileges, and make each of them whole in the manner described in the Remedy section, of the Board's Decision and Order, for any loss of earnings they may have sustained in the interim between the respective dates of their discharge or layoff and December 3, 1962.

(c) Notify the above-named individuals if presently serving in the Armed Forces of the United States of their right to full reinstatement upon application in accordance with the Selective Service Act and the Universal Military Training and Service Act of 1948, as amended, after discharge from the Armed Forces.

(d) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payments, records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Decree.

(e) Post at its plants in the vicinity of Cambridge City, Indiana, copies of the notice attached hereto as "Appendix." Copies of said notice, to be furnished by the Regional Director, of the National Labor Relations Board for the Twenty-fifth Region, (Indianapolis, Indiana), after being signed by a duly authorized agent of Golay & Co., Inc., shall be posted by it immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken to insure that said notices are not altered, defaced, or covered by any other material.

(f) Notify the aforesaid Regional Director, in writing, within 10 days from the date of this Decree, what steps the Golay & Co., Inc. has taken to comply herewith.

/s/ Roger J. Kiley
Judge, United States Court of Appeals for the Seventh Circuit

/s/ John S. Hastings
Judge, United States Court of Appeals for the Seventh Circuit

/s/ Walter J. Cummings, Jr.
Judge, United States Court of Appeals for the Seventh Circuit

A True Copy:
Teste:

/s/ Kenneth J. Carrick
Clerk of the United States Court of Appeals for the Seventh Circuit.

APPENDIX

NOTICE TO ALL EMPLOYEES

PURSUANT TO

A Decree of the United States Court of Appeals enforcing an order of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, we hereby, notify you that:

WE WILL not unlawfully interrogate our employees concerning their own and other employees' union membership, activities, or desires, or threaten them with discharge or reprisals for engaging in activities on behalf of International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW-AFL-CIO, or any other labor organization, or promise or grant them benefits for the purpose of discouraging their union activities.

WE WILL NOT engage in surveillance of the union activities of our employees or ask them to engage in surveillance and report to us on the union activities and sentiments of their fellow employees.

WE WILL NOT threaten to close, sell, move, or terminate our operations if our employees join, designate, or assist the above named UAW or any other labor organization as their collective-bargaining agent; nor will we attempt to form or organize a labor organization for our employees.

WE WILL NOT interfere with the right of our employees to wear union insignia.

WE WILL NOT in any other manner interfere with, restrain, or coerce employees in the exercise of their right to self-organization, to join or assist the above-named union, or any other labor organization, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other

mutual aid or protection, or to refrain from any and all such activities.

WE WILL offer the employees named below immediate and full reinstatement to their former or substantially equivalent positions without prejudice to their seniority or other rights and privileges, and will make them whole for any loss of pay, plus interest at the rate of 6 percentum per annum, which they may have suffered by reason of the discrimination against them:

Baker, Marion K.	Jones, Walter
Blair, Earl R.	Keal, Ronald L.
Caudill, James	Lawrence, Robert
Cecil, Henry Jr.	Meyer, Robert
Chaney, Walter H.	Mills, Willie Joe
Clemons, William	Nash, Charles
Cornet, Harold	Nick, Robert Lee
Dillman, George	O'Dear, Billy
Durham, Howard	Paris, Paul
Eldridge, George	Pebworth, Lester
Ford, Earl	Powell, James
Fowler, Bivon	Purvis, Donnie Ray
Fowler, Kenneth	Raby, James
Fox, John H.	Raby, John
Frady, Marvin	Sams, Paul
Goble, Gerald	Steele, James
Hall, Benny	Toney, Richard
Harrison, Thomas J.	Transier, Andrew
Herbert, Edward	Tyree, Billy
Isaacs, Robert	Vickers, Delbert
James, Jesse	Winchester, James
Jamison, John	Wyramon, Carl

WE WILL make whole Walter Heaston and Melvin Moistner for any loss of earnings they sustained by reason of our discrimination against them.

All our employees are free to become or remain or refrain from becoming or remaining members of the above-named or any other labor organization.

Golay & Co., Inc.
(Employer)

Dated ..... By .....
(Representative) (Title)

NOTE: We will notify any of the above-named employees if presently serving in the Armed Forces of the United States of their right to full reinstatement upon application in accordance with the Selective Service Act and the Universal Military Training and Service Act of 1948, as amended, after discharge from the Armed Forces.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material.

Employees may communicate directly with the Board's Regional Office, 614 ISTA Center, 150 West Market Street, Indianapolis 4, Indiana (Tel. No. Melrose 3-8921), if they have any question concerning this notice or compliance with its provisions.

APPENDIX E

Labor Management Relations Act (Taft-Hartley Act) §8(a)(3), 61 Stat. 140 (1947), 29 U.S.C. §158(a)(3) (1964):

> "It shall be an unfair labor practice for an employer— by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization . . ."

Labor Management Relations Act (Taft-Hartley Act) §10(c), 61 Stat. 147 (1947), 29 U.S.C. §160(c) (1964):

> "The testimony taken by such member, agent, or agency or the Board shall be reduced to writing and filed with the Board. Thereafter, in its discretion, the Board upon notice may take further testimony or hear argument. If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this subchapter: Provided, That where an order directs reinstatement of an employee, back pay may be required of the employer or labor organization, as the case may be, responsible for the discrimination suffered by him . . . No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any back pay, if such individual was suspended or discharged for cause. . . ."

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In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 1370

GOLAY & COMPANY, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, AND INTERNATIONAL UNION OF UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, UAW–AFL–CIO

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a–7a) is reported at 371 F. 2d 259. The Board's decision and order (C.A. 7–34)[1] are reported at 156 N.L.R.B. 1252.

JURISDICTION

The judgment of the court of appeals was entered on December 1, 1966 (Pet. App. 8a–9a). A petition for

[1] "C.A." and "B.A." references are to the separate volumes of the printed record prepared for the court of appeals by petitioner and the Board, respectively. Copies of these documents have been filed with the petition.

rehearing *en banc* was denied on February 6, 1967, and a decree was entered on February 8, 1967 (Pet. App. 10a, 11a). The petition for a writ of certiorari was filed on May 8, 1967. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the findings of the Labor Board that the employer restrained and coerced its employees and discriminated against them are supported by substantial evidence.

2. Whether, where strikers have engaged in misconduct in connection with a strike caused by the employer's unfair labor practices, the Board may nonetheless order them reinstated with back pay, if, after balancing the severity of the employer unfair labor practice conduct against the employee misconduct, it concludes that such a remedy would effectuate the policies of the National Labor Relations Act.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, 61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151 *et seq.*, are printed at p. 19a of the petition.

STATEMENT

A. THE BOARD'S FINDINGS OF FACT

In late September 1962, respondent union started its campaign to organize the employees at petitioner company's Lee Cylinder, Special Products, and Chore Boy plants, located near Cambridge City, Indiana (C.A. 38–39, 54–55; B.A. 9, 38–41, 47–48). Beginning September 26, the union representative in charge of

the campaign conducted a series of employee meetings at the Union Hall, where he formed plant organizing committees and distributed authorization cards, union buttons, and other materials bearing the union's designation (C.A. 38; B.A. 10–14, 28, 29, 41, 49–50, 62–63, 72, 78–79, 92–93, 99, 116–117, 150, 162–163, 196–197, 330–332). The pro-union employees thereafter prominently displayed these organizational indicia at work, passed out union literature on the company's premises, and solicited the support and membership of their co-workers (*ibid.*).[2]

1. THE COMPANY'S INTERFERENCE WITH AND RESTRAINT AND COERCION OF ITS EMPLOYEES

From the outset of the union's campaign in late September until the strike on November 19, 1962, the company opposed the drive by interrogating employees concerning their union activities and that of their fellow employees; engaging in surveillance and inducing employees to engage in surveillance and to report on the union activities of their co-workers; threatening employees with discharge, lay off, and related economic reprisals if they joined or assisted the union; promising and granting employees economic benefits if they refrained from becoming members of or assisting the union; attempting to form a labor organization among its employees; and interfering with the rights of employees to wear the union's insignia at work (C.A. 8, 38–54). Thus, Lee Cylinder

[2] During October 1962, the union filed petitions under Section 9 of the Act for Board elections at the three plants (C.A. 38; B.A. 12–13, 20).

Plant Manager John Bigler openly spied on the September 26 union meeting (C.A. 38–40; B.A. 9–10, 23–24, 103–106, 121–122, 150–151, 177–180, 240–243, 253–254, 318–321, 354–355). Bigler also interrogated employees coercively concerning their union activity and solicited their assistance in the surveillance of concerted activities (C.A. 40–45, 48; B.A. 63, 106, 197–198, 220–221, 278–279, 292).[3] Other representatives of management, including Personnel Director Joseph Lunsford and Lee Cylinder Plant Superintendent Robert Moore, coercively interrogated employees and solicited them to let management "know" if the workers discovered any pertinent organizational information (C.A. 41–45; B.A. 50–52, 72–73, 79, 99, 138–139, 163–164, 181–182, 204, 297, 304–305).

Company representatives repeatedly threatened employees with discharge, lay off, and other economic reprisals if the company was organized (C.A. 42–49, 51; B.A. 29–30, 51–52, 104–106, 151, 157–158, 181–182, 197–198, 203–204, 220–221, 278–279, 292, 297, 310–312, 321–326, 333–335, 342–343, 375–379). For example, in early October, Chore Boy Plant Manager Kenneth Hoover admonished a group of employees that company president "Golay would close the doors or sell out if the Union got in" (C.A. 47; B.A. 29–30, 333–335, 342–343). In addition, there were promises and grants of benefit to employees, conditioned upon their rejecting unionization (C.A. 49–51; B.A. 99–100, 122–

[3] As Bigler instructed one interrogated employee, "if you know anybody that knows anything about the Union, tell them it could mean more money for them" if they would "talk" to the plant manager (C.A. 41; B.A. 106).

123, 180–182).[4] Personnel Director Lunsford invited employees Billy Tyree and Walter Chaney—known union protagonists—to meet with company president C. R. Golay (C.A. 51; B.A. 321–322, 371–376). At that meeting, Golay proposed the formation of a grievance committee in lieu of the union. Tyree and Chaney subsequently advised that the employees "wanted an election," whereupon Golay warned that he "wasn't going to operate under [a] Union" (C.A. 52; B.A. 322–326, 376–379).

2. THE COMPANY'S DISCRIMINATORY TREATMENT OF EMPLOYEES JAMES, MOISTNER, HEASTON, AND PARIS

Employee Jesse James was chiefly instrumental in arranging the September 26 union meeting, which he attended and which Plant Manager Bigler openly observed (C.A. 38–39, 54–55; B.A. 9, 38–42, 47–48). Two days later, Bigler laid off James in disregard of a company-wide seniority policy (C.A. 13, 55, 58, 59; B.A. 36–38, 42–43, 91–92, 174–175, 465–468).[5] Seven

[4] Typical of this repeatedly utilized device was Foreman Ramalez' statement to employee Earl Ford that he had "heard * * * that if [the employees] gave up the idea of a union, [Mr. C. R. Golay] was aiming to give everybody a raise" (C.A. 49–51; B.A. 99–100). And Foreman Fink told employee Edward Herbert that he was going to let him work overtime the following day because Herbert had earlier told Fink that he "took [his] Union button off" (C.A. 50; B.A. 180).

[5] James was told by Bigler that he was being laid off the 100-pound line in the Lee Cylinder plant because he had a bad back and Bigler had decided to "bring [some people from the 20-pound line] over on the 100-pound line" (C.A. 55; B.A. 36, 42–43). But Bigler replaced James with 100-pound line employees having less seniority, and did not lay off other 20-pound or 100-pound line workers (C.A. 58; B.A. 38, 91–92,

days later, Personnel Director Lunsford terminated James for allegedly failing to report for reassignment, although James in fact had reported to the personnel office on two prior occasions and Lunsford's secretary had so advised the Personnel Director (C.A. 55–56, 58, 59; B.A. 43–45, 404–405, 407, 460).[6] Thereafter, a company representative cited James' firing to another pro-union employee, warning that he too had "better watch [his] step * * * they had already gotten rid of" James (C.A. 45; B.A. 104–106).

Employees Melvin Moistner and Walter Heaston were laid off on October 15 and 16, 1962, respectively, and were denied reinstatement until December 3, when the company had effectively eliminated its hard core union supporters and was in dire need of production and maintenance personnel (C.A. 9–15, 16–18, 60–69; B.A. 25–27, 329–330, 333, 337, 468–470, 472). Both employees, like James, were open and active union supporters and both were laid off and denied reinstatement in disregard of company-wide seniority and inter-plant transfer policies (C.A. 9–10, 13, 16–17, 60–61, 66–67; B.A. 11, 27–29, 30–31, 330–333, 335–336, 366–369, 468–469, 473). As Personnel Director Lunsford told Heaston in the presence of other employees when Heaston asked for his job back (C.A. 10, 63; B.A. 21–23, 32–33):

174–175, 465–468). Moreover, James' back condition had been tolerated by the company for two years, and had not interfered with his welding duties on the 100-pound line during the preceding six months (C.A. 55, 59; B.A. 43).

[6] The company in James' case did not follow its usual practice of actively seeking out laid off employees when conditions permitted a return to work (C.A. 58; B.A. 404–405).

> * * * do you mean to tell me you have enough nerve to come back here and ask for your job back after filing charges with the Labor Board. * * * I doubt very seriously if you will ever get back unless the Labor Board puts you back * * *. I seen you down at [the] Converto [plant] passing out union handbills with Melvin Moistner and the union representative. * * *

Employee Paul Paris was suddenly discharged on November 19, 1962. His organizational efforts were well known to company representatives (C.A. 69–73; B.A. 352–360).[7] He was allegedly discharged for removing anti-union literature from the plant bulletin board. Previously, the plant bulletin boards had displayed personal employee notices, which were placed there and removed by the workers without company approval or reprimand (B.A. 234–236, 289–291). About four hours after reporting for work on November 19, Paris was hurriedly summoned into Superintendent Moore's office, accused of removing anti-union literature from the bulletin board, and—although he denied the charge—discharged (C.A. 70; B.A. 360–361, 424).[8] Paris was summarily escorted by Personnel Director Lunsford to the locker room and then "down

[7] Two days prior to Paris' mid-morning discharge, Superintendent Moore warned him that Mr. Golay "didn't like it" that Paris and the other "guys" were a part of the "organizing campaign" (C.A. 69–70; B.A. 359). Moore had earlier warned another employee that "if he knew who [the union promoters were] he would fire them" (C.A. 42; B.A. 51–52).

[8] Management had decided to discharge Paris even before it asked him whether he had taken the literature down from the board (C.A. 70–73; B.A. 360–361, 424). Paris' foreman was not even consulted, as he would normally have been, prior to Paris' mid-morning firing (C.A. 72; B.A. 409–410).

the aisle" and "out of the plant" (C.A. 70–71, 73; B.A. 361).

3. THE UNFAIR LABOR PRACTICE STRIKE

Employee Billy Tyree, having been apprised of co-worker James' sudden firing, summoned other pro-union Lee Cylinder employees to a meeting in the plant parking lot during the noon lunch break on November 19 (C.A. 18, 73; B.A. 67, 120, 361–362, 379–381). Paris informed the assembled group of approximately 30 workers that it appeared that management "was picking them off one at a time," "taking the strongest union men and getting rid of them" (C.A. 18–19, 73; B.A. 67, 120, 379–381).[9] A majority of the assembled workers, in response to a proposal by Tyree, voted to return to the plant after lunch, stand by their respective work stations, and have Tyree, as their spokesman, "inform the Company" that they were protesting the discharge of Paris and wanted his immediate reinstatement. The entire group returned to the Lee Cylinder plant at approximately 11:50 a.m. (C.A. 19, 73–84; B.A. 380–382).[10] Shortly after enter-

[9] The discharges of employees James, Paris, and the other union supporters were discussed (C.A. 18–19, 22–23, 73; B.A. 63, 93–94, 139–140, 164–165, 182–183, 193, 280–281, 293, 379–381). In addition, the assembled employees were well aware of the company's coercive conduct, which had been extensive during the prior seven weeks when the company was attempting to defeat the employees' organization drive (C.A. 23).

[10] Despite the vote taken at this meeting, approximately half of the group, as well as those workers who later joined in sympathy, did resume work upon entering the plant and, for the most part, worked most of their scheduled shift that afternoon (C.A. 19; B.A. 53–56, 73–76, 85–88, 112–114, 117–119, 100–101, 166–167, 243–247, 79–82, 133–134, 292–294, 63–65, 93–96, 461).

ing the plant, Tyree informed his line foreman of the protest vote and the foreman—after telling Tyree to "just sit tight" (B.A. 408)—immediately relayed the information to higher management. Twenty minutes later, Tyree—having heard nothing from the company's representatives—asked the foreman what the employer intended "to do" about Paris, and the foreman replied: "We're not going to do anything * * * I'm waiting on a phone call" (C.A. 19, 74; B.A. 381–385).

Thereafter, from 12:45 to 3:00 p.m., management conducted three separate polls among the employees, asking them whether they intended to work. Some employees, in response to one or more of the polls, expressly refused to work; some stood mute; and some agreed to work and were assigned various tasks, which they performed. By 4:00 p.m., 34 workers had been discharged at various times during the afternoon because they refused to work or stood mute when polled (C.A. 19–26; B.A. 6–8). Of the 34 discharged employees, approximately half remained on the employer's premises from one and one-half to three hours after being discharged; the others remained an hour and a quarter or less; the average time spent by the employees on the plant premises after having been told they were discharged was an hour and a half (C.A. 20; B.A. 53–57, 64–65, 73–74, 80–82, 85–88, 94–96, 100–103, 107–109, 112–114, 118–119, 123–125, 127–129, 131, 134–136, 141–142, 152–153, 155–156, 159–160, 184, 187, 189–191, 193–194, 199–201, 206–208, 212–213, 221–222, 224–225, 230–231, 237–238, 244–246, 250–251, 273–274, 281, 287, 293–294, 298–299, 305–309, 315–316,

327–328, 347–350). Many of the discharged workers were never ordered, during the polling, to vacate the employer's premises (C.A. 22, n. 8; B.A. 57, 65, 68, 70, 74, 77, 81, 88, 95, 101, 113–114). During the afternoon, there was no violence or act of defiance against the plant management or supervisory personnel. Company representatives moved freely throughout the plant. Almost half the normal day shift worked the entire day and even the vast majority of the striking employees worked most of their scheduled shift. Non-striking employees were not prevented from working. Most of the night shift reported for work that evening. (C.A. 18–26; B.A. 56–58, 65–66, 73–75, 77, 80–83, 87–89, 94, 101, 109–110, 112–113, 125–126, 145, 153, 155–156, 159–160, 166–168, 171, 186, 200, 205–206, 209, 211–212, 226, 230, 245–247, 274–275, 276, 282, 293–294, 299–300, 301–302, 310, 315–316, 396–397, 351–352, 416–418, 437.) [11] The union representative in charge of the campaign, after being advised of what had occurred in the plant, hurried to the scene. Arriving at about 4:00 p.m., he instructed the workers to leave the plant. Those who had

[11] Thus, Foreman Fink, in charge of the 100-pound line where the main body of protesters worked; assigned his non-striking employees various duties that afternoon, and they were not "prevented" from working; nor did he witness strikers "shut off machinery," "commit any acts of violence or destruction of property," or prevent incoming night shift employees from working (C.A. 18–26; B.A. 410–414). Supervisor Jones also did not "see anyone physically obstruct employees from working" (B.A. 423–424), and company president Golay, as well as his supervisory personnel, walked unimpeded on the production floor during the course of the afternoon (B.A. 396–397).

remained then left (C.A. 20, 157–158; B.A. 14–16, 385).[12]

The striking employees commenced picketing the Lee Cylinder plant at 6:00 a.m. on November 20, and continued thereafter for over two weeks (C.A. 20–21, 26–27, 158–159; B.A. 61, 389–390). The picketing was confined to the entrance of the company's main parking lot, an unfenced area through which employees approached the plant working areas. Company president Golay saw approximately 40 pickets during the morning hours on November 20 (C.A. 20, 26; B.A. 400–402, 406–407, 431–432). Although the first few cars of non-striking workers were stopped at the picket line briefly, the cars were able to enter after Golay openly and repeatedly exhorted the drivers to "run over the sons of bitches," and dispersed the cars (B.A. 172–174, 395–396, 70). No car was actually prevented from entering and employees passed through the line unmolested. The peace officers present at the picket line neither made arrests nor considered the strikers disorderly; the pickets adhered to their instructions. From 7:30 a.m. on November 20 to the end of the two week strike, the picketing continued without incident (C.A. 21, 26–27; B.A. 61–62, 70, 146–149, 172–174, 214, 216, 225–226, 256–257, 264–265, 270–271, 276, 398–402, 406–407, 418–419, 421–422, 431–438, 449–457).

[12] The union representative advised company personnel director Lunsford, upon his arrival, "Joe, you are able to settle this in a very few minutes * * * return the people to their jobs." Lunsford told the representative that he was "trespassing" and "should move off" (B.A. 15, 167–168).

At the end of the strike, the 34 employees discharged on November 19, and 8 additional employees who joined the strike on November 20, were denied reinstatement by the company despite their unconditional offer to return to work (C.A. 27–29).

B. THE BOARD'S CONCLUSIONS AND ORDER

The Board concluded that the company, in opposing the union's organizational campaign, engaged in widespread coercive conduct in violation of Section 8(a)(1) of the Act (C.A. 8), and discriminated against employees James, Moistner, Heaston, and Paris, in violation of Section 8(a)(3) of the Act (C.A. 9–18).[13] In addition, the Board found that, since the 42 employees had struck against the company's unfair labor practices, the company further violated Section 8(a) (3) and (1) by denying reinstatement to them at the end of the strike (C.A. 18–27). The Board rejected the company's defense that the striking employees had, by in-plant loitering and "mass picketing," engaged in unprotected activity which justified their discharge or the employer's refusal to reinstate them. Alternatively, the Board held that, even if the strikers' conduct were assumed to be unprotected, the conduct was not of such a "serious nature in the total circumstances of this case to warrant a denial of * * * reinstatement when measured against the company's massive unfair labor practices" (C.A. 26).

[13] In Heaston's case, the Board further concluded that the company's denial of recall also violated Section 8(a)(4), because an unfair labor practice charge had been filed with the Board on behalf of that employee (C.A. 15).

The Board ordered the company to cease and desist from the unfair labor practices found; to reinstate employees James and Paris and reimburse them and employees Heaston and Moistner for any loss in earnings resulting from the discrimination against them; to reinstate the 42 unfair labor practice strikers and reimburse them for any loss in earnings; and to post notices of the Board's action (C.A. 29–33).

C. THE COURT OF APPEALS' DECISION

The court of appeals sustained the Board's findings that the company had violated Section 8(a)(1) of the Act and discriminated against employees James, Moistner, Heaston, and Paris (Pet. App. 3a). The court further agreed that substantial evidence supported the Board's finding of protected activity with respect to 19 of the 42 unfair labor practice strikers, but declined to sustain the finding as to the remainder, stating, "we need not and do not decide whether the other [23] discharges constituted similar violations or whether the alleged misconduct was protected" (Pet. App. 4a). However, the court accepted the Board's alternative rationale, concluding (Pet. App. 6a) that "the Board was justified in ordering reinstatement of the employees involved" since the "strike and picketing was caused by Golay's 'massive' unfair labor practices" and the employee "misconduct was not of such a serious nature in the total circumstances of this case as to warrant denial of their reinstatement."

ARGUMENT

The decision of the court below is correct and is not in conflict with any other decision. There is no occasion for further review.

1. Petitioner contends (Pet. 7–8) that the Board's unfair labor practice findings, sustained by the court below, are not supported by substantial evidence. Such evidentiary issues do not warrant review by this Court. *Universal Camera Corp.* v. *National Labor Relations Board,* 340 U.S. 474, 491. In any event, the Board's findings are amply supported by the record (Statement, *supra,* pp. 2–12) and indeed, although petitioner asserts (Pet. 7–8) that the Board, "with the acquiescence of" the court of appeals, "has rewritten the facts to support a decision," the company makes no attempt to controvert in its petition the substantial, credited testimony supporting the Board's findings.

2. Petitioner also challenges (Pet. 8–9) the validity and application of the *Thayer* principle, announced in *National Labor Relations Board* v. *Thayer Co.,* 213 F. 2d 748 (C.A. 1), certiorari denied, 348 U.S. 883. *Thayer* holds that, where a strike is caused by the employer's unfair labor practices, the mere fact that employees have engaged in misconduct during the strike does not disqualify them from reinstatement and back pay; the Board, after balancing the employer's unfair labor practices against the employee misconduct, still may properly conclude that a remedy for the employees would effectuate the policies of the Act. This principle is consonant with Section 10(c) of the Act (Pet. App. 19a), which confers

broad remedial authority on the Board, and has been accepted by every circuit that has had occasion to consider its validity.[14] Petitioner's attack on the *Thayer* principle does not warrant review by this Court.

Petitioner's further contention that the principle was improperly applied here raises no issue of general importance, since it turns on the facts of this particular case. In any event, the Board plainly did not abuse its discretion in concluding that the company's "massive" unfair labor practices far outweighed in gravity any employee misconduct which occurred, and thus that it would effectuate the policies of the Act to order all of the strikers reinstated with back pay.[15]

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[14] *National Labor Relations Board* v. *Puerto Rico Rayon Mills*, 293 F. 2d 941, 947 (C.A. 1); *Kohler Co.* v. *National Labor Relations Board*, 300 F. 2d 699, 702–705 (C.A. D.C.), certiorari denied, 370 U.S. 911, 345 F. 2d 748 (C.A. D.C.), certiorari denied, 382 U.S. 836; *Oneita Knitting Mills* v. *National Labor Relations Board*, 64 L.R.R.M. 2724. See, also, *National Labor Relations Board* v. *Wallick*, 198 F. 2d 477, 484 (C.A. 3); *National Labor Relations Board* v. *Wichita Television Corp.*, 277 F. 2d 579, 585 (C.A. 10), certiorari denied, 364 U.S. 871; *National Labor Relations Board* v. *Plastic Applicators, Inc.*, 369 F. 2d 495, 497–498 (C.A. 5).

The decisions relied upon by petitioner (Pet. 12–13), to demonstrate a conflict among the circuits are clearly distinguishable. See Brief For the National Labor Relations Board in Opposition, filed in *Kohler Company* v. *National Labor Relations Board*, No. 353, October Term, 1965, pp. 21–24. As we there point out, the decisions in question involved either no employer unfair labor practices or none that could be said to have provoked the employee misconduct.

[15] In sharp contrast to the facts here, *National Labor Relations Board* v. *Fansteel Metallurgical Corp.*, 306 U.S. 240, involved a sit down strike, and *National Labor Relations Board* v. *Longview Furniture Co.*, 206 F. 2d 274 (C.A. 4), a criminal

CONCLUSION

The petition for a writ of certiorari should be denied.[16]

Respectfully submitted.

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assault. In this case, as the court of appeals found, "the November 19 strike did not come within the term 'sitdown' strike" and the employees' conduct did not "amount to 'seizure of control'" (Pet. App. 5a).

[16] Respondent union was allowed to intervene in the court below. It has advised us after examination of this brief in opposition that it concurs in the views expressed herein and will not file a separate response to the petition for certiorari.

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